SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 332.

GERARD E. BERNE,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petition for Rehearing

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PETITION FOR REHEARING.

Petitioner presents his petition for a rehearing of this Court's order dated October 13, 1969, denying the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and in support thereof, respectfully shows:

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Since the filing of the petition herein four federal circuit court rulings have come to light which deal with one of the issues presented in the petition, *i.e.*, the giving of the controversial *Allen* or "Dynamite" charge. These decisions amount to intervening circumstances of substantial effect within the contemplation of Rule 58 of the Rules of this Court.

On July 8, 1969, the Ninth Circuit, in not finding reversible error in the giving of the *Allen* charge, stated, "We doubt that it is really any longer advisable to give the *Allen* instruction at all, and it certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted." *Sullivan v. United States*, No. 22,193. On July 17, 1969, and on August 27, 1969, the Fifth Circuit approved the charge in two cases before it, thus expanding on that circuit's approval under some circumstances and disapproval under others. *Posey v. United States*, No. 25,654, and *Sanders v. United States*, No. 25,043. On August 27, 1969, the Eighth Circuit held that the charge passes muster, but points out that because of "increasingly frequent" attacks on the *Allen* charge, the district courts of the circuit must exercise care in giving the charge. *United States v. Pope*, No. 19,408.

Thus, the situation of conflict and confusion among the circuits is broadened. This is especially so because of the

holdings of the Third and Seventh Circuits that the typical *Allen* charge will no longer be approved. *United States v. Fioravanti*, No. 17,398, and *United States v. Brown*, No. 16,772, decided June 16, 1969, and June 6, 1969, respectively. Although the Third and Seventh Circuits found no reversible error in these particular cases, they have served notice that giving the charge in the future will be reversible error. The conflict is manifest. Unless the conflict is resolved, an unjustifiable discrimination between defendants in different jurisdictions will result.

2. The petitioner herewith submits within the contemplation of Rule 58 another substantial ground available to petitioner although not previously presented.

Before the trial, defense counsel filed an affidavit establishing that prior to trial counsel had been informed that detectives would not discuss the case with him by reason of a standing order of the Chief of the Investigation Bureau prohibiting the detectives from discussing any criminal case with counsel. The affidavit was never controverted. The defense made an appropriate pre-trial motion for the court to issue a rule to show cause why the information should not be dismissed for these reasons. The motion was denied. Moreover, the court refused to direct the officers that they had a right to discuss the case with counsel if they wished. Inasmuch as the Chief of the Investigation Bureau is an important arm of the prosecution, this was tantamount to situations wherein a prosecutor directs prosecution witnesses that they may not discuss with defense counsel cases in which they are involved. The error in this is manifest. And, even if one argues that each witness may decide for himself whether he chooses to talk with defense counsel, *the important point is that each witness should have that choice left to himself.* He should not be squelched by an official pronouncement or policy of the prosecution or of any arm of the prosecution. There is no

tenable reason why police officers or detectives should be excluded from such a reasonable rule.

Witnesses do not belong to one party to a litigation. Counsel has a right to interview any witness or prospective witness who may have information pertinent to his client's case. *Canon 39, Canons of Professional Ethics.* Instructions by one in charge of any phase of the prosecution that witnesses should not talk to the defense (or that they may talk only in the presence of that person in charge, or only with that person's consent) are quite impermissible, indeed, unconstitutional. See *Gregory v. United States,* 369 F. 2d 185 (D. C. Cir., 1966); *United States v. Enloe,* 15 U. S. C. M. A. 256, 35 C. M. R. 228 (1965), and cases cited.

The American Law Institute and the American Bar Association Joint Committee have recently released the *Trial Manual For The Defense Of Criminal Cases* (1967). This major undertaking, consisting of two large volumes, was prepared as a project of these organizations together with the National Defender Project of the National Legal Aid and Defender Association, and is designed to give counsel guidance in the proper representation of criminal defendants. It has been prepared under the guidance of an advisory committee and consultants consisting of leading federal and state judges, prosecutors, defense attorneys, educators, etc. This manual, at Sec. 118, p. 2-83, states that under circumstances wherein witnesses have been instructed not to talk with defense counsel, counsel should move the court for a rule to show cause (a) why the charges against the client should not be dismissed with prejudice, on the ground that there has been unconstitutional interference with the preparation of the defense, and that there is no way of knowing how much harm has been done, or of setting it right at this stage; or, at least, (b) why the prosecution should not be ordered to identify all witnesses to whom such instructions have been given, so they can all be brought before the court and instructed by the court that

they are free to speak to the defense. Moreover, the foregoing *Manual* proposes that by analogy from the cases cited hereinabove, and from *Curran v. Delaware*, 259 F. 2d 707 (3rd Cir., 1958), counsel should seek a judicial order compelling uncooperative officers to tell counsel what they know (even where their unwillingness to talk to counsel is not referable to the prosecutor), on the ground that a policeman, like the prosecutor himself, is a state official and is forbidden to suppress anything helpful to the defense.

All of this was presented to the trial court, and notwithstanding the infinite fairness of the request the court denied the motion out of hand. As previously suggested, this amounted to an unconstitutional interference with the preparation of the defense, and there is no way of knowing how much harm has been done. However, one example of the harm which was visited upon defendant in the case at bar by reason of the silence of the police was the non-disclosure of a doctor who had examined the prosecutrix and had reportedly stated that it was impossible to determine whether she had been raped. As stated in respondent's brief herein (at p. 8), "The police apparently did not report his existence." Such witness, if known to the defense prior to trial, could well have been most important to the defense if produced in court. Whether or not the inability of the defense to produce this witness was harmful, the point is that to this day it is impossible to determine how much harm resulted from the impermissible denial of the authorities to allow defendant to adequately prepare his case.

We urge upon the Court the proposition that the foregoing error presents an important question of federal law which should be settled, and the circuit court's refusal to reverse on this ground has sanctioned a departure from the accepted and usual course of judicial proceedings which is serious enough to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorai issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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THOMAS D. IRELAND,
Counsel for Petitioner.
THOMAS W. FINUCAN,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

THOMAS W. FINUCAN,
Counsel for Petitioner.